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VIRGINIA LAW REGISTER

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As we go to press on the 20th of each month, the State Bar Association will have met and adjourned before the REGISTER for this month of August reaches our readers. The meeting was held on July 29th, 30th and 31st at the Hot Springs.

The Virginia State Bar Association. As there has been a change in the management of the hotel at that resort we hope members had less cause to complain of the rooms given them and the absolute indifference as to engagements which often occurred in former years. We swore a solemn oath after our last experience when the Association met there, that the "Hot" should see us no more, and hence we trust our presence was missed, as it will continue to be at all future meetings at the same place.

The meeting this year was of unusual interest, we have no doubt, as it marked a new departure in the program. Instead of having papers read by members of the Association a "free to all" discussion upon the subject "Should the present system of taxation in Virginia be changed and if so, in what respect, and how such change is to be accomplished" was held and we have no doubt it proved alike useful and entertaining. Evidently the "paper" program was beginning to lack interest or "paperers," as we notice in examining a list of the papers that the same gentlemen were pressed into service more than once under the old régime—which indicates either lack of material or lack of willingness.

We sincerely hope that the discussion of the important question presented called forth able and suggestive arguments. There is no lack of ability amongst the Virginia Bar and we know of

no class of men who can be of vaster service towards solving many of the difficult problems that face our Commonwealth, than the learned lawyers who practice in the Virginia courts. They have never done themselves justice in the meetings of the Association. The "talks" were generally of a rather perfunctory kind and sometimes by talkers who really talked for the sake of the talk and nothing more. It is true our lawyers are hard worked men and the social features of the meeting are so delightful that few cared to "waste" time and energy over the "weightier matters of the law," when the opportunity was afforded for "rest and refreshment." And yet no one can read the discussion upon the "Examinations for License to Practice Law" held at Old Point last year without being struck with the earnestness, zeal and ability with which the matter was taken up. We had the misfortune to miss that meeting, being at the time engaged in testing a certain "divine brew" in the town made famous by sweet Kitty (of the song)—Coleraine. Had Kitty's pitcher held a gallon of that "potheen" instead of buttermilk her tears would have been justified and no kiss could have consoled her. But we regret that we were not present—not only for the pleasure of meeting our brethren from different parts of the State, but that we might have listened to the arguments presented and gained, as we know we would have gained knowledge and profit from the interchange of ideas.

We trust the meeting was a great success and may be the precursor of meetings of interest, usefulness and profit hereafter.

And speaking of the Bar Examination, we publish this month the last list of questions which applicants for license were required to answer. We regret that the exam-
The Last Bar iners do not confine themselves more to funda-
Examination. mental principles and to questions of general practice. Complaint has been made and we think rather justly that "catch questions" are given and subjects which present grave difficulties even to those learned in the law are chosen. We understand that one question which was proposed to be asked was rejected by the whole Board of Examiners after conference. We are still of the opinion that the examina-

tions are too severe and that evidently a rigid system of "marks" is adopted. We do not believe that a license should depend upon a fraction or even more of any given figure. If the answers indicate a reasonable knowledge of the principles of the law and show fair ability upon the part of the applicant, he should not be rejected because he made 74 and a fraction instead of 75, or even if he failed by more points than this. It is not always the candidate that answers the most questions who will prove to be the best advocate and practitioner.

In the case of *Spriggs v. Jameson* decided by our Supreme Court of Appeals at Wytheville, June 12th, 1913, an important question was before the court which **When Should a Statute Be Construed by a Court of Last Resort?** was not answered. We cannot but express our regret that the court declined to pass upon the statute which was before it in that case,

nor can we agree with the court that its reason for so declining is a good one. The case was an action of ejectment in which there had been three trials. In each of them there was a verdict for the defendant. The first verdict was set aside upon motion of the plaintiff by the trial court. In the second trial the court refused to set aside the verdict, the case was appealed, and upon appeal reversed by the Supreme Court for errors of law, the verdict set aside and the cause remanded for a new trial. *Coles v. Jamerson*, 112 Va. 311, 71 S. E. 618. Upon this new trial there was again a verdict for the defendant which the Court refused to set aside but entered judgment. To that judgment a writ of error was awarded. The defendant insisted that the trial court had no power to set aside the verdict rendered on the last trial and that even if it had there was no error in the proceedings for which it could have done so.

Section 3392 of the Code provides that "not more than two new trials shall be granted to the same party in the same cause."

The Supreme Court held that upon an *examination of the evidence* in the cause it was clear that there was no error in the judgment complained of and accordingly affirmed it. The court, however, in the introductory part of its opinion states that, though

this statute had been in force for more than a century, it had never been passed upon or construed in this State in any reported case.

The court also stated that the same, or substantially the same statute had been in force in a number of states and that there was much diversity of opinion among them as to its effect. And yet the court declined to construe the statute saying,

"Since there is such a diversity of opinion in other jurisdictions as to the proper interpretation of the statute in question and as its construction *is not absolutely necessary* (italics ours) to a disposition of the case, because the action of the trial court in refusing to set aside the third verdict was clearly right upon its merits this Court ought not to undertake to declare the meaning or effect of the statute until a case arises in which its construction is required in order to dispose of the case."

Now it does seem to us that one of the reasons given by the court for declining to construe the statute was the strongest reason for its action, i. e., that there was a great diversity of opinion in other jurisdictions as to the proper interpretation of the statute—or a similar one. The statute was clearly before the court; the defendant raised the issue upon the statute and whilst it might not have been "absolutely necessary" to pass upon it, surely the very doubt raised as to its true meaning by other courts ought to have impelled our own court to dispel all doubts as far as our own jurisdiction is concerned, and not leave the lower courts to wander in the maze of doubt raised in other jurisdictions.

Why in a matter of this kind should the court hesitate to decide both questions? It certainly had the right to do so. It was surely expedient that an end should be put to litigation involving this statute and not compel some unfortunate judge to risk the danger of reversal because he agreed with one of the other jurisdictions, with which our own court may not hereafter agree. Nor should suitors be compelled to go to the expense and trouble of an appeal at some future day to test a question which was plainly before the court and whose determination would have finally and forever put an end to a disputed question, filled with doubt and which may be decided in a dozen circuits in different ways before the opportunity is afforded for an appeal.

We are thoroughly aware of the rule long since established that the Appellate Court will not pass upon a question which it deems unnecessary to decide, but the rule is not one to which exceptions should not be allowed. If ever there was a case in which an exception should have been made it is in the present case, for the very reason it seems to us that the court sets out—diversity of opinion in other jurisdictions. The Supreme Court of the United States in a very recent case, *Nalle v. Oyster et al.* decided June 16th, 1913, was met with a similar condition of affairs.

The Court of Appeals of the District of Columbia declined to pass upon a question of privilege raised by a plea to the second count of a declaration for slander on the ground that it was unnecessary. And the Supreme Court said this was true, for if the alleged cause of action was concluded (as it was claimed) by a former adjudication it was immaterial whether the cause of action was in itself well founded. But the Supreme Court settled the question by such a decided "hint" that it will not be raised again. "However," the court said, "it is not out of place to say that it cannot be doubted that the second count of the declaration taken in connection with the second plea thereto shows a situation that clearly renders the subject matter of the alleged libelous answer to have been privileged." We wish our own court had given us at least a "hint" in the case under discussion.

If any one had any doubt as to the hard work imposed upon our Supreme Court it will be quickly dispelled by an examination of the opinions handed down at the June term in Wytheville. These opinions are in cases of unusual novelty and importance and a perusal of them indicates as well an unusual degree of hard work. For they are thoughtful, well conceived and indicate thoroughness of preparation. We do not propose, even if we had the time, to "poach upon the preserves" of our associates. Their annotations are too valuable to allow us to scare them off from any cases, but we cannot forbear from calling attention to

**The Session of Our
Supreme Court of
Appeals at Wytheville.**

a few of these opinions. *Wardell v. Birdsong*, from the Circuit Court of Sussex, is an exceedingly interesting and valuable decision upon "Sales of Land in Gross" and "Contracts of Hazard" as to such sales. The decision in *St. Stephens Episcopal Church v. Norris' Admr.*, from Culpeper at first glance looks very much like a case of "chastizing his Satanic Majesty around the decapitated timber," but we think is a just even though somewhat ingenious decision.

A church cannot under § 1398 of the Code take and hold real estate by devise. A testator devised his real estate and personal property to St. Stephens Episcopal Church in Culpeper, the real estate being considerably less than one-half of the estate; but the will further provided that one-half of his estate was to be devoted to the erection of a memorial fence around the churchyard, and the court—we think properly—held that the church took this half as a trustee to carry out this purpose of the testator and that the real estate should be devoted to this purpose and the personality go to the church.

The decision in *Lambert v. Barrett*, from Alexandria is one likely to cause some surprise, as the court in that case holds that a member of a City Council is not a municipal officer within the meaning of the Act of Feb. 17th, 1906. A perusal of the opinion, whilst all may not agree entirely with its conclusions, will convince anybody that we need in our General Assembly somebody, or some committee, to prevent legislation which appears in almost irreconcilable conflict with other legislation and that "confusion worse confounded" will be the result unless something is done to check hasty and ill-conceived statute making and statute tinkering.

It is rather curious to see how often lawyers fail to note that when error is assigned for the refusal of the trial court to allow a witness to answer a question, the record must show what the answer would have been in order to make the assignment of error available. This failure is shown in *Holladay v. Moore*, though our court has time and again passed upon the question. We suggest it as one to be asked at the next bar examination, so as to stamp it in the mind of the coming practitioners.

It is frequently said that the Virginia Legislature probably passed as many useless laws as any other in creation and we are disposed sometimes to find a tremendous lot of fault with those gentlemen who go down to serve us for the small stipend the State thinks it can afford for their services. The great State of California, however, it seems can give us a few lessons in old Virginia as to the way to legislate. At the last session of the California Legislature four thousand bills were introduced, eleven hundred were passed. One bill sought to regulate the size of chicken coops (we think we have something of that sort in this State); another was framed to dictate the style of shoes school children should wear; another sought to regulate the size of sheets for hotels (it seems to us there is something strangely familiar about this act). Apparently the Legislature went mad, as some other Legislatures sometimes do, over the idea that everything under the sun could be regulated by law. In addition to this the Legislature appropriated nearly twenty million dollars, California having a population of 2,377,549.

Thirty-one commissions were appointed by the Legislature to examine into everything that was done in the State and it is estimated that the cost of these commissions will amount to about one million dollars. It is a strange and very dangerous tendency, this idea that there can be a law which will check every evil under the sun and that human nature can be regulated by statutes as easily as a watch can by a watchmaker. We sincerely trust that our legislatures may take warning by the evil example of California and go slow. Certainly if the public press is to be taken as an index, the demands of the press and the promises of the candidates already begin to look as if there is some danger of our having a replica of California legislation. But whisper it not in Gath, tell it not in the street Ascalon—a prominent woman speaker lays all of California's freak legislation to the fact that the women at last have suffrage in that state.

Reminiscences of the Reconstruction days and of legislation passed at that time, or very soon after, are never pleasant, but

**The Last Echo of
Civil Rights.**

occasionally as a ghost of one of these old acts is summoned by some Witch of Endor or Saul-like lawyer from the shades to which it has been relegated for so many years, the case is not without interest. The case of *Butts v. Merchants & Miners Transportation Company*, decided June 16, 1913, by the Supreme Court of the United States finally and forever lays the ghost of the old Civil Rights Act of 1875. We believe that this decision will be greeted very much like the decease of the famous citizen of one of the northern towns when some one asked, "What complaint?" The reply was, "No complaint at all—everybody thoroughly satisfied." A colored individual named Butts bought a first class ticket for the Merchants & Miners Line plying from Boston to Norfolk. Both going and coming she was required to take her meals at a second table and given a stateroom on the lower deck instead of one on the upper one where white passengers possessing like tickets were given rooms. She sued for twelve penalties of five hundred dollars each. She attempted to meet the decision upon this same law in the Civil Rights Cases, 109 U. S., page 3, by alleging that the law was only held invalid as to States but that as to the District of Columbia or the territories or high seas the law was still in full force and effect. In the Civil Rights Cases it was decided that the sections of the Act of 1875, under which this plaintiff sued, were invalid in this: First, that they received no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not indicated in the exercise of that power; and second, that as applied to the States they are unconstitutional and void because in excess of the power conferred upon Congress and an encroachment upon the powers reserved to the States respectively.

The Supreme Court of the United States in the present decision holds that the act being invalid in one respect is invalid in all; that it was the manifest purpose of the Congress in passing this act to establish a uniform law for the entire jurisdiction of

the United States, and therefore it could not be converted into a purpose to create a law for only a small fraction of that jurisdiction. The statute as passed was both penal and criminal and therefore had to be strictly construed. The party aggrieved had an election to demand a penalty of five hundred dollars for each offense, or the offender could be fined not less than five hundred dollars nor more than one thousand, or imprisoned for not less than thirty days nor more than one year. The Supreme Court therefore held, quoting *James v. Bowman*, 190 U. S. 127; *U. S. v. Ju Toy*, 198 U. S. 253; and *Poindexter v. Greenhough*, 114 U. S. 270, that the whole construction of the act depended upon the general words used therein "within the jurisdiction of the United States," which alone indicated where the sections were to be operated, and that therefore there could be no limited jurisdiction and that the whole act was invalid.